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A Matter of Life And Death: Posthumous Conception

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INTRODUCTION

Posthumous birth has long been recognized by both the common and civil law and occurs when a husband dies after the conception of a child, but before its birth. Due to the long-established presumption that a child born to a mother within three hundred days of her husband's death is the legitimate child of the husband,[1] a posthumous child is legally and socially recognized as the offspring of the father and receives the benefits flowing from that recognition.

Recent scientific developments challenge the conventional presumption by demonstrating that procreation may occur after death. Through artificial insemination, individuals may store their gametes for future use, thus prolonging their reproductive capabilities beyond life. The use of artificial insemination to reproduce after the death of one or both of the parents is often called "posthumous conception."[2] Posthumous conception challenges the validity of paternity and inheritance laws by blurring the once bright lines between death and life.

Posthumous conception is a phenomenon the law has largely ignored and one that illustrates the necessity of a legal system that is not only reactionary, but progressive as well. The majority of states' statutes continue to implicitly deny posthumously conceived children legal status and inheritance rights by utilizing conventional filiation and inheritance laws that never contemplated this medical development. Faced with outdated legislation, some courts have found the statutes obsolete and inapplicable to the children's situation.[3] Other states, possibly fearing the disruption of estates as

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1. La. Civ. Code art. 185.

2. This article only addresses the inheritance rights of children conceived after the death of their fathers. Although posthumous conception following the death of a mother is possible, it requires a surrogate for gestation and thus raises different issues.

There are several reasons a man may wish to preserve his sperm for posthumous use: when faced with the threat of sterility caused by chemotherapy or radiation, military service in war, or even when contemplating suicide. *See* Sheri L. Gilbert, *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, 22 Hofstra L. Rev. 521, 525-26 (1993) (noting increased donation during the Vietnam conflict and more recently during the Persian Gulf Conflict); John A. Gibbons, *Who's Your Daddy?: A Constitutional Analysis of Post-Mortem Insemination*, 14 J. Contemp. Health L. & Pol'y 187, 190 (1997).

3. In both *In re Estate of William J. Kolacy* and *Woodward v. Comm'n of Soc. Security,* the courts ignored paternity and inheritance laws they found had not

well as other problems that posthumously conceived children bring to the law, expressly prohibit granting a posthumously conceived child any right to inherit from its father. The constitutional validity of strict prohibitions against inheritance or legal status is highly questionable.[4] To avoid the inconsistent case-by-case determinations of courts, constitutional scrutiny, and antiquation, legislatures should address the need for changes in the law created by posthumously conceived children and create a means by which they may achieve legal status.

Until 2001, Louisiana was among those states that denied posthumously conceived children inheritance rights or legal status.[5] However, during the 2001 Regular Session, the Louisiana Legislature passed a statute granting posthumously conceived children inheritance rights when certain criteria are satisfied.[6] In doing so, Louisiana became the first state to develop a mechanism by which most posthumously conceived children will attain legal status and inheritance rights while also effectively balancing various competing interests. By recognizing inheritance rights for posthumously conceived children, Louisiana has acknowledged that the law can adapt to changes in medical technology and that modern families are formed in a variety of ways. Moreover, by balancing the state's interest with those of the child and the decedent, Louisiana's legislation is a model for other states struggling to effectively legislate on the matter. Nonetheless, Louisiana's legislation, though an important beginning, may be improved.

Part I of this comment examines the problems that arise in both common law states and Louisiana when the legal rights of a posthumously conceived child are analyzed under traditional inheritance laws. Part II describes the Louisiana legislation granting legal status to posthumously conceived children. In Part III, the unique clash of competing interests caused by posthumous conception is examined. Part IV compares Louisiana's legislation with the jurisprudence and legislation of other states. Finally, Part V addresses the problems with Louisiana's legislation and suggests some potential reforms.

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contemplated posthumously conceived children in order to curb the harsh consequences that would result from a strict application of the statutes. In re Estate of William J. Kolacy, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2002). Woodward v. Comm'n of Soc. Security, 760 N.E.2d 257 (Mass. 2002). *See infra* Part IV.A. *But see* Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961 (D. Ariz. 2002) (discussed *infra* Part IV.A.6).

4. *See infra* Part IV.C.

5. *See infra* Part II.A.1–2.

6. La. R.S. 9:391.1 (2001). *See infra* Part III.

I. PROBLEMS OF PATERNITY AND INHERITANCE

Conventional filiation and inheritance laws deny a posthumously conceived child legal status as the child of its biological father. The result is not often intentional, but occurs because the law did not consider the possibility of a medical phenomenon such as posthumous conception. Although it may be possible for a posthumously conceived child to inherit a mortis causa donation from its father in common law states,[7] the child is nonetheless denied intestate inheritance and other benefits. Similarly, Louisiana's succession laws prevent a posthumously conceived child from receiving intestate or testate inheritance by denying it the capacity to inherit.[8]

A. The Posthumously Conceived Child is Not a "Child"

The posthumously conceived child's difficulty in attaining legal recognition is a result of traditional laws that do not contemplate the possibility of posthumous conception.[9] Children are classified as either legitimate or illegitimate.[10] Legitimate children are conceived or born during marriage or have been legitimated.[11] By definition, posthumously conceived children are not legitimate because they are neither born nor conceived during marriage, nor can they be legitimated by a deceased parent. A presumption of paternity is provided to a child born less than 300 days after its mother's husband's death.[12] Because of the difficulty of successfully implanting and giving birth within the presumptive period, a child conceived after its father's death will not be protected by such a presumption.[13]

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7. *See infra* Part II.B.1.

8. *See infra* Part II.B.2.

9. "It is doubtful that the [Louisiana] legislature contemplated situations in which children were conceived after death of a genetic parent and the accompanying problems with filiating because the technology of assisted conception had not yet advanced to where it was probable that parents would procreate after death." Ellen J. Garside, *Posthumous Progeny: A Proposed Resolution to the Dilemma of the Posthumously Conceived Child*, 41 Loy. L. Rev. 713, 719 (1996). *See also* 42 U.S.C. § 416(h)(2)(A) (1994) (defining "child" as one that was dependent on the deceased or upon the relationship to the insured as discerned by state law). *See also* La. Civ. Code art. 940 (to exist for purposes of inheritance, a child must be in utero at the time of a parent's death).

10. *See* La. Civ. Code art. 178.

11. *See* La. Civ. Code art. 179. Children may be legitimated by either subsequent marriage of parents or by a parent's execution of an authentic act. La. Civ. Code art. 198 & 200.

12. See Unif. Parentage Act § 9B U.L.A. 377, 397 (1973) (a child born within three hundred days from the dissolution of marriage is a child of the husband).

13. In order for her child to receive the benefit of the three hundred day presumption of paternity, the surviving spouse would have to achieve successful

Illegitimate children are neither born nor conceived during marriage.[14] Because posthumously conceived children are born after the death of a parent and thus outside marriage, many commentators refer to them as illegitimate.[15] However, although illegitimate children are protected by the law and provided a means by which they may assert their paternity, posthumously conceived children are not. Louisiana provides two methods by which illegitimate children can assert paternity: formal acknowledgment by the parent[16] or a paternity action filed within one year of the parent's death.[17] These protections fail to provide an effective means by which a posthumously conceived child can assert paternity. A deceased father cannot acknowledge his child nor is the child likely to be born in time to assert a paternity action.

The law provides two methods by which illegitimate children can assert paternity: the presumptions of paternity or an action within one year of the decedent's death.[18] However, these protections fail to provide an effective method by which a posthumously conceived child can assert paternity, as a child conceived after the death of its father is unlikely to be born within the presumptive period, nor in time to assert a paternity action.[19]

Thus, posthumously conceived children are denied rights given all other children because they cannot be classified as either legitimate or illegitimate under the laws of intestacy. Posthumously conceived children are therefore not considered "children" under current legal schemes.

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implantation within days of her husband's death. This is often very difficult due to the grieving process the surviving spouse may experience and the possible necessity of repeated procedures before implantation will be successful.

14. *See* La. Civ. Code art. 180.

15. Garside, *supra* note 9, at 715. "Children either conceived or born during marriage are legitimate children and children conceived and born out of marriage are illegitimate.... Therefore, a child conceived after the death of a parent is born out of marriage and is thus, illegitimate." *Id.*

16. La. Civ. Code art. 203.

17. La. Civ. Code art. 209.

18. *See, e.g.*, 42 U.S.C. § 416(h)(2)(A) (1994) (defining "child" as one that was dependent on the deceased or upon the relationship to the insured as discerned by state law). *See also* Unif. Parentage Act § 4, 9B U.L.A. 377, 397 (1973) (a child born within three hundred days from the dissolution of marriage is a child of the husband); La. Civ. Code art. 940 (to exist, a child must be in utero at the time of a parent's death); La. Civ. Code art. 209 (a child has one year from the death of his father to bring a paternity action).

19. In order for her child to receive the benefit of the three hundred day presumption of paternity, the surviving spouse would have to achieve a successful implantation within days of her husband's death. This is often very difficult due to the grieving process the surviving spouse may experience and the possible necessity of repeated procedures before implantation will be successful.

B. Legal Status to Inherit

Traditional filiation and inheritance laws deny posthumously conceived children legal status as the children of their biological fathers. In common law states, a posthumously conceived child may inherit pursuant to its father's testament but is denied intestate inheritance and other benefits. Louisiana altogether denies a posthumously conceived child legal status as the child of its deceased father, thus prohibiting the child from inheriting either through testacy or intestacy.

1. Testate Inheritance

Generally, courts do not interfere with a testator's intent and will enforce testamentary dispositions unless they are contrary to public policy or law.[20] Thus, if a posthumously conceived child was a named beneficiary in its deceased parent's will, that child should be permitted to inherit pursuant to the will. Where omitted from a parent's will, posthumously conceived children may find relief in common law states with pretermission statutes.[21] Pretermission statutes are designed to protect a child who has been left out of a parent's will, often because the decedent failed to amend the will after the birth of a child.[22] It is presumed the omission was inadvertent rather than intentional, and the pretermission statutes correct this dilemma by providing for the omitted child.[23] Although the statutes contemplate a child born during the lifetime of its father, it may also be reasonable to presume that the testator would want to provide for his posthumous child, and analogously, to his posthumously conceived child.[24] In addition, that a testator had his sperm preserved could be viewed as an indication of intent and awareness of the possibility that a child will be posthumously conceived.[25] Under the pretermission statutes, a court may apply the statutory presumption that the testator intends for all his children, including those conceived and born after his death, to be included in his will unless he clearly indicates otherwise.[26]

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20. Katheleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. Davis L. Rev. 193, 197 (1997).

21. Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Post-Mortem Conception, Parental Responsibilities, and Inheritance*, 33 Hous. L. Rev. 967, 983–84 (1996).

22. *See, e.g.*, Unif. Probate Code § 2–302.

23. *Id.*

24. James E. Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance*, 47 DePaul L. Rev. 743, 792–93 (1998).

25. *Id.* at 794–95.

26. *Id.*

The only limitation on the common law testate transfer is that the beneficiary must be ascertainable within the period of the Rule against Perpetuities. The Rule against Perpetuities prohibits transfers of property if the interest is not vested after twenty-one years from the death of some person alive when the interest was created.[27] Thus, following the parent's death, if no child is posthumously conceived within twenty-one years, pretermission statutes will no longer apply and any inheritance rights the posthumously conceived children may have had will be lost.

Instead of pretermission statutes, Louisiana maintains the doctrine of forced heirship to protect children omitted from a parent's will, even when the omission was intentional. Nonetheless, because posthumously conceived children do not "exist at the death of the decedent,"[28] any donations made to the children are null.[29] To "exist," one must be in utero at the time of a parent's death.[30] If a donation is made to one who is not in utero at the time of the testator's death, then the donation is null and void.[31] Because a posthumously conceived child is not in utero until after the death of its parent, it does not "exist" for purposes of inheritance.[32]

2. Intestate Inheritance

If a person dies without a valid will, the intestate inheritance laws of his domiciliary state will govern the distribution of the person's property. In order to inherit intestate, a child must be identified as that of the father, which requires the posthumously conceived child to qualify under a paternal presumption or to bring a timely filiation action; both alternatives are impractical and will therefore rarely be applied. Thus, despite an obvious biological connection to its father, the law denies the posthumously conceived child any legal

27. John Chipman Gray, The Rule Against Perpetuities 191 (4th ed. 1942).

28. La. Civ. Code art. 939. This article finds its common law equivalent in the doctrine of "l'en veutre sa mere."

29. La. Civ. Code art. 1475. The requirement that a child be in existence at the time of its parent's death in order to achieve legal status is further discussed *infra* in Part II.B.2.

30. La. Civ. Code art. 940.

31. La. Civ. Code art. 1475.

32. *See also* La. R.S. 9:133 (1986). "Inheritance rights will not flow to the in vitro fertilized ovum as a juridical person, unless the in vitro fertilized ovum develops into an unborn child that is born in a live birth, or at any other time when rights attach to an unborn child in accordance with law." *Id.* Louisiana Revised Statutes 9:133 permits inheritance rights to flow to fertilized ovum only if they result in a live birth. La. R.S. 9:133 (1986). This statute clarifies the requirement of "existence" by reiterating the incapability of a child conceived by artificial insemination to inherit before birth. *Id.*

association with its deceased father and consequently prevents the child from inheriting through intestacy.

Louisiana and many other states presume that a child born within three hundred days of a parent's death is the child of that parent.[33] In order to qualify for the presumption, the mother must achieve a successful artificial insemination immediately following the father's death. This is often impractical because the mother may go through a grieving period before she is emotionally able to undergo artificial insemination. Moreover, it may be necessary to repeat the procedure several times before implantation is successful. Because of the limited time it has to be born, a posthumously conceived child will rarely qualify for recognition as the child of its biological father pursuant to the statutory presumption of paternity.

In addition, according to Louisiana law, a child's action to establish paternity must be brought one year following the death of the parent.[34] Although it is possible that a child conceived after the death of a parent may be born within the one year prescriptive period, many children will be incapable of bringing a timely action for the same reasons they are unable to qualify for the three hundred day presumption of paternity.[35]

Louisiana's intestacy scheme,[36] unlike most states, makes the very difficult road to inheritance impossible for posthumously conceived children. In Louisiana, even if a child is born within three hundred days and brings an action within the one year prescriptive period, it will be denied legal status because it did not "exist at the death of the decedent."[37] Thus, in Louisiana, "the posthumously conceived child faces an irrebuttable presumption against heirship"[38] because even a

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33. The Uniform Parentage Act (1973) extended the common law presumption from two hundred and eighty to three hundred days. Unif. Parentage Act § 4, 9B U.L.A. 377, 397 (1973). Eighteen states have legislatively adopted this presumption: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming. *Id.* Although Louisiana did not adopt the Uniform Parentage Act, it has adopted the three hundred day presumption. La. Civ. Code art. 185.

34. La. Civ. Code art. 209.

35. Following the death of the father and before she may be ready to undergo insemination, the mother will go through a grieving process characterized by stress and upheaval. Even when she is ready to begin insemination, it may be necessary to repeat the procedure several times before a successful implantation.

36. By referring to Louisiana's intestacy scheme, the author is not referring to Louisiana's recent legislation specifically granting legal status to posthumously conceived children. Instead, the following paragraph considers the rights of posthumously conceived children under the state's general intestacy laws.

37. La. Civ. Code art. 939. *See supra* Part I. B. 1.

38. Garside, *supra* note 9, at 725 (citing the Amended Complaint of Nancy

child capable of filing a timely action for filiation will never gain inheritance rights due to its non-existence at the moment of its father's death.[39]

3. Social Security Benefits

Several of the cases addressing the issue of a posthumously conceived child's inheritance rights have arisen in the context of the child's eligibility for social security benefits.[40] The Social Security Act requires a child be dependent on the wage earner at any time prior to his death in order to be a recipient.[41] Alternatively, a child may be entitled to benefits if it is determined that the child may inherit under its domiciliary state's intestacy laws.[42]

Because the posthumously conceived child is born after the death of its father, the child is never dependent on him as required by the Act. Furthermore, state intestacy laws bar inheritance by a posthumously conceived child either by disqualifying it under current paternity and filiation statutes, or, as in Louisiana, by denying that the child existed at the time of its father's death.[43] As a result, posthumously conceived children are unlikely to be entitled to social security benefits.

II. LOUISIANA'S LEGISLATION: LOUISIANA REVISED STATUTES 9:391.1

In 2001, the Louisiana Legislature enacted Revised Statutes 9:391.1, establishing broad statutory inheritance rights for posthumously conceived children. However, in order for a posthumously conceived child to be legally recognized as the child of its biological father, certain conditions must be met. These conditions will later be shown to be necessary and effective in balancing the unique combination of interests at stake in posthumous conception.

The Louisiana Task Force on Assisted Conception and Artificial Means of Reproduction was the first to address the issue of inheritance rights for posthumously conceived children in Louisiana. It determined that a posthumously conceived child should be recognized as the child of the deceased father and that special

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Hart at 12, Hart v. Shalala, No. 94–9344 (E.D. La. Dec. 12, 1993)).

39. La. Civ. Code art. 939.
40. *See infra* Part V.A.3–5.
41. 42 U.S.C. § 402(d)(1) (1977).
42. 42 U.S.C. § 416 (1977).
43. *See* La. Civ. Code art. 939.

legislation was required to ensure such a result.[44] Concerned that genetic material would be used without the authorization of the father, the Task Force recommended that a father express his consent in writing that his gametes be used for the purpose of posthumous conception and indicate his intention that the child be recognized as his own.[45] The Task Force also believed that such consent should be terminated upon the mother's remarriage if the child is not yet conceived.[46] Moreover, to prevent estates from being held open indefinitely, the Task Force determined that legal recognition of the child should only take place if the child is born within three years of its father's death.[47]

The Louisiana Legislature considered the suggestions of the Task Force and incorporated some, but not all, of its proposals. It passed Act 479 in the 2001 Regular Session, adding Louisiana Revised Statutes 9:391.1 to the Civil Code Ancillaries.[48] Louisiana Revised Statutes 9:391.1, as originally enacted, required that the decedent express in writing his consent that his gametes be used by his surviving spouse.[49] The statute also required that the child be born within two years of the father's death in order to be presumed the child of the decedent.[50]

In 2003, Louisiana Revised Statutes 9:391.1(A) was amended pursuant to Act 495 of the 2003 Regular Session.[51] Several significant changes were effected by the amendment. First, Act 495 eliminated the "notwithstanding" clause referencing Louisiana Civil Code articles 179, 184, and 185. This language was replaced with the

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44. Report and Recommendations of the Louisiana Task Force on Assisted Conception and Artificial Means of Reproduction at 7–8 (2001).

45. *Id.* at 8.

46. *Id.*

47. *Id.*

48. 2001 La. Acts No. 479.

49. La. R.S. 9:391.1(A) (2001).

50. *Id.*

51. 2003 La. Acts. No. 495. Louisiana Revised Statutes 9:391.1, as amended, states:

> A. Notwithstanding the provisions of any law to the contrary, any child conceived after the death of a decedent, who specifically authorized in writing his surviving spouse to use his gametes, shall be deemed the child of such decedent with all rights, including the capacity to inherit from the decedent, as the child would have had if the child had been in existence at the time of the death of the deceased parent, provided the child was born to the surviving spouse, using the gametes of the decedent, within three years of the death of the decedent.
>
> B. Any heir or legatee of the decedent whose interest in the succession of the decedent will be reduced by the birth of a child conceived as provided in Subsection A of this Section shall have one year from the birth of such child within which to bring an action to disavow paternity.

La. R.S. 9:391.1 (2004).

phrase "[n]otwithstanding the provisions of any law," thus giving the statute pervasive effect over any contrary law as opposed to a few specific articles. Second, the amendment omitted the classification of posthumously conceived children as "legitimate," instead recognizing the posthumously conceived child as a "child." Next, the Act added the following clause: "with all rights, including the capacity to inherit from the decedent, as the child would have if the child had been in existence at the time of the death of the deceased parent." These changes clarify the intended effect of the statute. As stated in the Digest to the Act, the rights of the posthumously conceived child, particularly its capacity to inherit, are explicitly stated rather than merely presumed by the child's classification as "legitimate." Finally, the amendment to Louisiana Revised Statutes 9:931.1 altered the time limitation within which the child must be born following the parent's death. Prior to the enactment, Louisiana Revised Statutes 9:931.1 limited its beneficial presumption of legal status to children born within two years of the decedent's death. Act 495 has expanded that period to three years.

III. COMPETING POLICIES IN POSTHUMOUS CONCEPTION

Posthumous conception creates a unique competition between state and personal interests. In determining how best to resolve the problems faced by posthumously conceived children, a legislature must examine and attempt to balance the conflicting legal interests of the state, the child, and the decedent.[52] Traditional filiation and inheritance laws consider only the state's interests, while the interests of the child and the deceased father are ignored. Nonetheless, to grant posthumously conceived children unrestricted legal status would be to disregard the state's interests. The interests of all involved must be sufficiently addressed in order to achieve fair and effective legislation.

A. State Interests

The state's interest in stable land titles and the orderly distribution of property after death must be considered.[53] Various other state interests, such as the protection of the psychological well-being of the resulting child and the prevention of public dependency must also be weighed against the individual's interest in reproducing after death,

52. *See, e.g.*, Garside, *supra* note 9, at 730; Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. Rev. 901, 904 (1997).

53. Garside, *supra* note 9, at 730.

and the child's interests in parental support and proving filiation. Although each of the state's interests is important, it is improbable that one or all justify barring inheritance rights from posthumously conceived children, particularly if they interfere with the fundamental right to procreate or the constitutional rights of the child.

1. Timely Disposition of Estates

Posthumous conception creates the possibility that a child will make a claim against the decedent's estate years after his death. If the estate is already closed, beneficiaries and legatees may be subsequently liable. The Supreme Court has recognized that orderly disposition of property at death is a valid governmental purpose.[54] In part to protect this state interest, the Uniform Status of Children of Assisted Conception Act (USCACA) found it necessary to deny inheritance rights to posthumously conceived children altogether.[55] In contrast, the Massachusetts Superior Judicial Court in *Woodward v. Commissioner of Social Security*[56] found that these interests were served by state intestacy statutes that require proof of filiation and establish time limitations on actions against an estate.[57]

As recognized in *Woodward*, the timely disposition of estates, though an important governmental interest, can be adequately addressed without precluding legal status to posthumously conceived children. Requiring a limited time period within which a posthumously conceived child may bring an action against the estate effectively addresses the state's interest without imposing overly harsh restrictions on posthumously conceived children's ability to inherit. Thus, had the USCACA merely limited the time following the parent's death in which a child may assert inheritance rights, rather than limiting the rights themselves, it would have protected both the interests of the state and the posthumously conceived child.

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54. Reed v. Campbell, 476 U.S. 852, 106 S. Ct. 2234 (1986).

> [T]he state interest in the orderly disposition of decedent's estates may justify the imposition of special requirements upon an illegitimate child who asserts a right to inherit from her father, and of course, it justifies the enforcement of generally applicable limitations on the time and the manner in which claims may be asserted. After an estate has been finally distributed, the interest in finality may provide an additional, valid justification for barring the belated assertion of claims, even though they may be meritorious.

476 U.S. at 855, 106 S. Ct. at 2237.

55. Unif. Status of Children of Assisted Conception Act, 9C U.L.A. 363 (1988).

56. 760 N.E.2d 257 (Mass. 2002). *See infra* Part V.A.5.

57. 760 N.E.2d at 270.

2. Welfare of the Child

The state has an interest in the welfare of the child, particularly its psychological well-being.[58] The state may be concerned that a posthumously conceived child will suffer psychological damage when the circumstances of its conception are discovered. In addition, the child may be adversely affected if it is raised in a fatherless home. On the other hand, psychological harm to a posthumously conceived child may be no greater than the harm to a child whose father dies before it is born, or a child whose father dies while it is still young. In fact, posthumously conceived children may have an advantage that other fatherless children do not: the knowledge that they were the fulfillment of their father's wish.[59] Furthermore, by forbidding posthumously conceived children from inheriting from their fathers, the state would not serve its interest in the welfare of posthumously conceived children at all. Rather, limiting their support can only compound the harm they suffer.

These competing notions of the posthumously conceived child's welfare are only speculation. Until the state can show actual harm to a posthumously conceived child, its interest in the child's welfare ought not be sufficient to deny it legal status. Even if the state had an actual interest in the well-being of a posthumously conceived child, the state's concerns could only be effectively addressed by prohibiting posthumous conception altogether, an action that may violate the decedent's interest.[60]

3. Public Dependency

Another concern of the state is that a posthumously conceived child may become a public dependant. Ordinarily, an individual who contemplates having children is limited in his decision by the financial obligation to rear those children. However, economic restraints affecting procreative decisions become less important with the knowledge that death is imminent and someone else will face the responsibility of supporting the child. Therefore, it is arguable that allowing posthumous reproduction encourages single-parent support and possible public dependency of posthumously conceived children. However, while the natural economic restraints involved in

58. The state may also be concerned as to the health of a child conceived from sperm that has been stored for many years. However, healthy children have been born from sperm that was frozen for over ten years. E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & Health 229, 234 (1996).

59. Chester, *supra* note 21, at 1022.

60. *See infra* Part III.B.

procreative choices no longer affect the deceased father, these restraints are still faced by the mother. It can therefore be assumed that the cost of rearing a child on her own is a factor the mother will consider before undergoing artificial insemination.[61]

Ironically, by prohibiting the posthumously conceived child from inheriting, the state actually makes it more likely that it will become a public dependant. If a posthumously conceived child was recognized as a "child" under the law and given appropriate legal status, the possibility of its becoming a public dependant would be diminished by the financial support it would receive from the father's estate or that of his family, in addition to benefits from insurance and social security.

B. Decedent's Interests

The decedent's interests must also be taken into account. Even after death, it can be argued that the autonomy interests of an individual do not entirely dissipate and can be "posthumously harmed" by the conduct of the surviving parties.[62] Posthumous harm occurs when the decedent's autonomy interest is infringed by the disregard of his intent.[63] To prevent the deceased from becoming a biological parent when that is his intention, or to make him a biological parent when it is against his wishes, may constitute a harm to the deceased's interests because it violates his right to make procreative decisions.[64]

The United States Supreme Court has firmly established a right to procreate and a right to make procreative decisions.[65] Although the

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61. The argument that single parent income increases the possibility of public dependency is also contrary to the traditional recognition of families in which the husband is the only breadwinner.

62. Schiff, *supra* note 52, at 935–42 (citing Joel Feinberg, *Harm and Self-Interest, in* Law, Morality and Society: Essays in Honour of H.L.A. Hart 285, 299–308 (P.M.S. Hacker & J. Raz eds., 1977); Joel Feinberg, *The Rights of Animals and Unborn Generations, in* Philosophy and Environmental Crisis 43, 57–60 (William T. Blackstone ed., 1974)). *But see* John A. Robertson, *Posthumous Reproduction*, 69 Ind. L. J. 1027 (1994) (respect for autonomy alone cannot determine the importance of posthumous conception).

63. Schiff, *supra* note 52, at 935–42.

64. *Id.* at 942–43 (arguing that to inflict parenthood on someone after death, when that is not his desire, infringes upon his autonomy). *See also* Parpalaix c. Centre d'Etude et de Conservation des Oeufs et du Sperme humains, Trib. Gr. Inst. Creteil, Aug. 1, 1984, Gaz. Pal. (1984) at 11 (found a constitutional right to procreate that permitted posthumous conception to occur); Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 289 (Cal. Ct. App. 2d 1993) (finding a constitutional right to procreate that continues after death). *See infra* Part V.A.1–2.

65. Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct. 1110 (1942) (Court found procreation to be one of the basic civil rights of man); Griswold v. Connecticut, 381

Court found these rights where technology was used to prevent the conception of a child,[66] the Court has not yet decided whether the right to privacy includes a right for individuals to use technology to conceive a child, nor if the right extends beyond death. However, one may argue that these cases could be extended by analogy to protect the right to make procreative choices the effect of which will not take place until after death.[67] As one commentator pointed out, because present law protects the decedent's wishes regarding organ donation and disposition of property, "[i]t would be ironic indeed if the law . . . ignore[d] pre-mortem wishes concerning a matter as central to a person's identity as the desire . . . to create another human being."[68] If the decedent has a right to procreate that extends beyond death, the state will be prohibited from forbidding a surviving spouse the use of her husband's sperm to reproduce. Nonetheless, a post-mortem procreative right is theoretical at best. Unless the Court identifies such a right, the decedent's interest will not ensure inheritance by a posthumously conceived child.

C. Child's Interests

Even if the decedent does not have a right to procreate after his death, the posthumously conceived child's interests prevent a legislature from prohibiting its right to inherit. A child has both a right to financial support by its parents[69] and a right to prove paternity. These rights prevent a legislature from altogether barring a posthumously conceived child from the opportunity to attain legal status. They also require the child be afforded some means to establish paternity in the deceased father.

U.S. 479, 85 S. Ct. 1678 (1965); Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029 (1972); Carey v. Population Servs., 431 U.S. 678, 97 S. Ct. 2010 (1977). Through these cases, the Supreme Court cemented a fundamental right to make procreative choices when technology was used to prevent the conception of a child. *See* Karin Mika & Bonnie Hurst, *One Way to be Born? Legislative Inaction and the Posthumous Child*, 79 Marq. L. Rev. 993, 1001–08 (1996).

66. *Id.*

67. Janet J. Berry, *Life After Death: Preservation of the Immortal Seed*, 72 Tul. L. Rev. 231, 235 (1997). Berry also notes the American Fertility Society declared that "'[i]t is understood that the gametes and concepti are the property of the donors. The donors therefore have the right to decide at their sole discretion the disposition of these items . . . .'" *Id.* at 241 (citing Ethics Comm'n of the American Fertility Soc'y, *Ethical Considerations of the New Reproductive Technologies*, 46 Fertility & Sterility 89 (1986)). In addition, the courts in *Parpalaix v. CECOS* and *Hecht v. Superior Court* agree that the decedent has a fundamental right to procreate after death. *Paraplaix*, Trib. Gr. Inst. Creteil, Aug. 1, 1984, Gaz. Pal. (1984); *Hecht*, 20 Cal. Rptr. 2d 275. *See infra* V.A.1–2.

68. Schiff, *supra* note 52, at 943.

69. La. Civ. Code art. 227. Little v. Streater, 452 U.S. 1, 13, 101 S. Ct. 2202, 2209 (1981).

Historically, an illegitimate child was labeled "filius nullius"—the child of no one.[70] Illegitimate children lacked the capacity to inherit from or through either parent. By determining that it was unconstitutional to deny children rights based upon their birth, the Supreme Court held that "illogical and unjust" legislation[71] that created an impenetrable barrier to the assertion of the children's inheritance rights violated the Fifth Amendment's Equal Protection Clause.[72] Today, states offer illegitimate children the ability to prove paternity and to inherit from both of their parents.[73]

The situation once faced by illegitimate children is directly analogous to the legal deprivation of inheritance rights of posthumously conceived children. Due to the similarity of the situations and the "illogical and unjust" barrier faced by posthumously conceived children who wish to be legally recognized as their fathers' child, the Court should analyze these cases under the standard by which the barriers against illegitimate children were analyzed.

States prohibiting inheritance by posthumously conceived children, or even states that merely imply this result by continuing to analyze the rights of posthumously conceived children according to traditional filiation law, violate the Equal Protection Clause.[74] Denial of inheritance rights to posthumously conceived children, merely because they were conceived at a time and by a means that most children are not, is classification based upon birth. Furthermore, to make the children suffer when they had no responsibility in the circumstances of their births, is "illogical and unjust." Therefore, posthumously conceived children, like illegitimate children, should be afforded an opportunity in which to assert paternity and gain legal status.

Even so, the Supreme Court has held that intestacy laws that do not absolutely block children's inheritance rights are constitutional if they bear a substantial relationship to an important government objective.[75] Because some posthumously conceived children may be

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70. David Line Batty, *Michael H. v. Gerald D.: The Constitutional Rights of Putative Fathers and a Proposal of Reform,* 31 B.C. L. Rev. 1173, 1176 (1990) (citing 1 W. Blackstone, Commentaries 458–59).

71. Trimble v. Gordon, 430 U.S. 762, 769, 97 S. Ct. 1459, 1465 (1977) (held a state statute unconstitutional because it only allowed illegitimate children to inherit by intestate succession from their mothers).

72. *Id.* at 773, 97 S. Ct. At 1465.

73. *See* Unif. Probate Code § 2–114, 8 U.L.A. 91 (1998).

74. Garside, *supra* note 9, at 722. Chester, *supra* note 21, at 990 (explains that such a statutory scheme would present illegitimate children with an impenetrable barrier to the assertion of their inheritance rights which was prohibited by the Supreme Court in *Trimble v. Gordon*, 430 U.S. 762, 97 S. Ct. 1459).

75. Mathews v. Lucas, 427 U.S. 495, 503–05, 96 S. Ct. 2755, 2761–62 (1976)

born within the small window permitted by the three hundred day presumption,[76] the Court may find that posthumously conceived children are not presented with an "impenetrable barrier." Nonetheless, because the classification excludes "at least some significant categories of illegitimate children of intestate men [whose] inheritance rights can be recognized without jeopardizing the orderly settlement of estates"[77] or any other governmental interest, such intestacy laws will violate equal protection.[78]

In addition to granting legal status, legislatures must provide an adequate time period within which posthumously conceived children may assert their rights. In *Mills v. Habluetzel*,[79] the United States Supreme Court found that a Texas statute denied equal protection to illegitimate children by requiring them to bring a filiation action within one year. The Court recognized that "[b]y granting illegitimate children only one year in which to establish paternity, Texas has failed to provide them with an adequate opportunity to gain support."[80] In addition, the Supreme Court in *Clark v. Jeter*[81] found a six year statute of limitations on paternity actions did not satisfactorily provide illegitimate children with an opportunity to obtain support. The Court found the limitation violated the Equal Protection Clause after determining that the limitation must provide a child with a reasonable opportunity to assert a claim.[82]

Due to the similarity between the past treatment of illegitimate children and the present treatment of posthumously conceived children, legislation that limits the ability of the posthumously conceived child to inherit or provides only a short time for the child to bring an action for legal status, will violate the Equal Protection Clause. It is unlikely that the Court will find the neglect or discrimination of posthumously conceived children substantially related to the accomplishment of any government objective.[83] Thus, although the state's interests in the timely disposition of estates and

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(established this "intermediate" standard for children classified by birth).

76. The court may also consider that in some states, a posthumously conceived child may inherit if listed as a beneficiary in its father's will.

77. *Trimble*, 430 U.S. at 774, 97 S. Ct. at 1467.

78. *See* Part IV.A.1.

79. 456 U.S. 91, 102 S. Ct. 1549 (1982).

80. *Id.* at 100, 102 S. Ct. at 1555.

81. 486 U.S. 456, 463, 108 S. Ct. 1910, 1919 (1988).

82. *Id.*

83. The court may also find such legislative schemes unconstitutional because of the availability of less restrictive alternatives. For example, the governmental end of timely disposition is adequately satisfied by statutes of limitations on paternity actions. Similarly, the governmental end of final determination of paternity is inadequate justification because posthumously conceived children can easily prove a biological connection with their fathers.

the child's welfare are important, equal protection will require that some means be given to a posthumously conceived child to assert its legal status.

D. The Balance of Competing Interests in Louisiana's Legislation

Louisiana Revised Statutes 9:391.1 simultaneously balances the rights of the state, decedent, and child. The child is given inheritance rights, subject only to conditions that prevent infringement on the rights of the decedent and state. The three year limitation, within which a child must be born to attain legal status, is much less restrictive than the former one year statute of limitations for paternity actions because it offers posthumously conceived children a more realistic opportunity to assert paternity and reduces interference with the parents' procreative rights.[84] A lesser period is impractical due to a number of factors such as the mother's grieving period, the probability of repeated attempts at implantation,[85] the gestational period, and the recovery time immediately following. The three year period also serves the state's interest in the timely disposition of estates, for it is not unusual for estates to take longer than three years to settle. A period greater than three years could have severe consequences on the stability of settled estates. In addition, the three year limitation may deter a widow considering posthumous conception from attempting conception after the time limitation, consequently serving the state's interest in protecting the welfare of a child whose health may be placed in jeopardy by extended storage. Thus, Louisiana's legislation reasonably balances the child's right to paternity and support, the decedent's autonomy interest, and the state's interests in timely disposition of estates and child welfare.

IV. COMPARISON TO OTHER JURISDICTIONS

A. Jurisprudence

The first cases addressing posthumous conception did so indirectly by addressing the donor's ability to bequeath his sperm and the public policy surrounding posthumous conception. These cases did not determine whether a posthumously conceived child may inherit from its biological father. More recently, courts have directly addressed intestate inheritance by posthumously conceived children with conflicting results.

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84. Chester, *supra* note 21, at 995–96.

85. There is only a twenty-two to twenty-seven percent success rate of artificial insemination per month. American Society for Reproductive Medicine *available at* http://www.asrm.org./Patients/FactSheets/Infertility. In addition, the gestational period takes nine months.

1. Parpalaix c. Centres d'Etude et de Conservation des Ouefs et du Sperme humains

The issue of whether posthumously conceived children are the legal heirs of their deceased fathers was first addressed in France in *Parpalaix c.Centres d'Etude et de Conservation des Ouefs et du Sperme humains*[86] (CECOS). The case received international attention and appears to have greatly influenced courts in the United States as they attempt to understand and address posthumous conception.[87]

Alain Parpalaix was diagnosed with testicular cancer.[88] Concerned that the recommended chemotherapy would cause sterility, he deposited his sperm in a government sperm bank without demonstrating his intent for the sperm in the event of death.[89] Faced with imminent death, Alain married his girlfriend just two days before he died.[90] After his death, Alain's widow sought his sperm for her use in artificial insemination.[91]

The French court acknowledged the difficulties of the country's outdated laws and only inquired as to Alain's intent based upon the fundamental right to procreate.[92] In the absence of Alain's written intent, the court found that Alain's wife and parents were in the best position to articulate his intentions for the frozen sperm and ordered CECOS give the sperm to Alain's widow.[93] Nonetheless, it noted in dicta that any child consequently born would be prohibited from inheriting from its father.[94] Thus, even though the court found that the fundamental right to procreate survived death, a child

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86. Shapiro & Sonnenblick, *supra* note 58, at 229, n. 4 (citing Trib. Gr. Inst. Creteil, Aug. 1, 1984, Gaz. Pal. (1984) at 11). CECOS is the Center for the Study and Conservation of Sperm, a government run sperm bank in Paris. *Id.* at 229.

87. *See e.g.*, Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Cal Ct. App. 2d 1993).

88. Shapiro & Sonnenblick, *supra* note 58, at 229.

89. *Id.* at 229–30.

90. Id. at 230.

91. *Id.* Alain's widow argued she was entitled to the sperm as natural heir under contract law. She also argued that although it was not expressly written, Alain intended her to use the sperm to conceive a child after his death. *Id.* at 230–31.

92. *Id.* at 232. The court dismissed the contract theory and reasoned that the "fate of the sperm must be decided by the person from whom it is drawn." *Id.*

93. *Id.* at 232–33.

94. *Id.* at 231. According to the French Civil Code, any child born more than three hundred days after the death of the mother's husband is not presumed to be child of the husband. *Id.* at 231 (citing C. civ. art. 315). Even if the child should qualify for the presumption of paternity, the child would be barred from inheriting from its father because the child must exist at the time of death in order to have capacity to inherit either testate or intestate. *Id.* at 231–32.

posthumously conceived and born pursuant to that fundamental right would not be legally recognized as the child of its biological father.[95]

2. Hecht v. Superior Court

In *Hecht v. Superior Court,*[96] California became the first state to address whether artificial insemination may be used to achieve posthumous conception.

The decedent, William Kane, was a divorcee with two children.[97] He cohabitated with Deborah Hecht for the five years preceding his suicide.[98] Upon Kane's decision to end his life, he deposited his sperm with a sperm bank, intending that Hecht use the sperm after his death to produce a child.[99] This intent was manifested by his testamentary donation of the sperm to Hecht for her use, written authorization at the sperm bank to release the sperm to Hecht, and a letter to his children stating that he hoped Hecht would have a child after his death.[100] When Hecht sought control of the sperm in order to attempt conception, Kane's children filed a will contest seeking destruction of the sperm.[101]

The California Court of Appeal reversed the trial court's decision that ordered the destruction of Kane's sperm. The appellate court found that it was not against public policy to allow an unmarried woman to undergo artificial insemination using a dead man's sperm and that the fundamental right to procreate overrode any possible psychological harm to existing children.[102] The court acknowledged Kane's intent to have children posthumously and concluded that "assuming that both Hecht and decedent desired to conceive a child using decedent's sperm, real parties fail to establish a state interest sufficient to justify interference with that decision."[103] Accordingly, the court awarded Hecht the decedent's sperm.[104] However, as in *Parpalaix,* the California court noted in dicta that a child conceived

95. As a result of this decision, the French government enacted a law that prohibited posthumous insemination, as well as assisted conception used for non-medical reasons, homosexuals, or unattached women. Gilbert, *supra* note 2, at 559–60 (citing C. San. Pub. arts. L. 152–1 to –10). The government believed that such uses of artificial insemination would strain social resources and discourage the traditional nuclear family. *Id.*

96. 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 2d 1993).

97. *Id.* at 276.

98. *Id.*

99. *Id.*

100. *Id.* at 276–77.

101. *Id.* at 278.

102. *Id.* at 289.

103. *Id.* at 283.

104. *Id.* at 291.

from the artificially preserved sperm would probably be prohibited from inheriting from Kane's estate under California intestacy law.[105]

3. Hart v. Shalala

In *Hart v. Shalala*,[106] the Social Security Administration questioned whether posthumously conceived children could inherit under Louisiana's intestacy laws. The case concerned a posthumously conceived child, Judith, who was born more than three hundred days after her father's death and was thus prohibited recognition as her biological father's child under the presumption of paternity.[107] In addition, her action for filiation prescribed when she was ten days old.[108]

Relying on the Social Security Act, as well as Louisiana's intestate and filiation law, the Social Security Administration denied Judith's claims to benefits, finding that a posthumously conceived child did not qualify under the Social Security Act and that the child was not legitimate for purposes of intestate succession.[109] Following that determination, Judith's mother sued the Social Security Administration.[110] An administrative law judge consequently found that Edward was Judith's legitimate father, entitling her to Social Security benefits.[111] The ALJ held that the law violated equal protection, resting his decision on the Supreme Court's prior finding that one year was not sufficient to give a reasonable opportunity for those with an interest in a child to assert claims on the child's behalf.

The Social Security Appeals Council ignored the equal protection concerns and overturned the decision of the ALJ. It found that Judith was not a legitimate child because she did not "exist" at the time of her father's death.[112] The mother appealed to Federal District Court, but prior to the appellate hearing, the Social Security Administration reversed its position in order to avoid a test-case on the constitutional

105. *Id.* at 290. The California probate law in effect during *Hecht* permitted an illegitimate child to establish paternity after the alleged father's death only if a court order had been entered during the father's life or the father had openly held out the child as his own. This law has since been repealed and replaced. For a discussion on the change and its implications concerning posthumously conceived children see Chester, *supra* note 21, at 986.

106. No. 94–3944 (E.D. La. Dec. 12, 1993).

107. Original Complaint of Nancy Hart at 3, *Hart v. Shalala*, No. 94–3944 (E.D. La. Dec. 12, 1993).

108. Garside, *supra* note 9, at 721.

109. Original Complaint of Nancy Hart, *supra* note 107,at 6.

110. *Id.*

111. Judith C. Hart at 6 (determination of Soc. Sec. Admin. March 27, 1995).

112. Guzman, *supra* note 20, at 227, N. 118 (citing Joseph Wharton, *'Miracle' Baby Denied Benefits*, 82 A.B.A. J. 38, 38 (Feb. 1996)).

issues raised.[113] Judith Hart was thus granted Social Security benefits, but the issue of whether Judith could properly inherit under Louisiana intestacy law was never settled.

4. In re Estate of William J. Kolacy

The next case to address the issue of legal status and inheritance was *In re Estate of William J. Kolacy,*[114] where New Jersey faced the issue of whether twin girls born eighteen months after the death of their father were entitled to Social Security benefits.[115] After Kolacy's death from leukemia, his wife conceived the twins from sperm Kolacy deposited before undergoing chemotherapy.[116] Kolacy's wife sought Social Security benefits for the children, but the Administration denied the claim, finding that under New Jersey's intestacy law, only children conceived before their father's death can inherit.[117] The twins' mother then filed a claim in the New Jersey state courts, arguing that her daughters should be declared capable of inheriting under intestate law.[118]

Noting the lack of guidance on the issue, the Court reasoned that the children were entitled to be recognized as the heirs of their father[119] because of the general legislative intent that children "should be amply provided for" in the event of their father's death.[120] According to the Court, this intent in favor of children should prevail over a "restricted, literal reading" of the statute.[121] In a very result-oriented decision, the Court applied an equitable solution and permitted the posthumously conceived children to inherit from their biological father.[122]

5. Woodward v. Commissioner of Social Security

In *Woodward v. Commissioner of Social Security,*[123] the Massachusetts Supreme Judicial Court was asked by the U.S. District Court of Massachusetts whether a posthumously conceived child

113. *Id.* at 228, n. 126 (citing Joseph Wharton, *Social Security Case Settled*, 82 A.B.A. J. 40, 40 (May 1996)).
114. 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).
115. *Id.* at 1258.
116. *Id.*
117. *Id.* at 1259–60.
118. *Id.* at 1259.
119. *Id.* at 1260.
120. *Id.* at 1262.
121. *Id.*
122. *Id.*
123. 760 N.E.2d 257 (Mass. 2002).

conceived child enjoyed inheritance rights under Massachusetts intestacy law for purposes of attaining Social Security benefits.[124] Upon discovering that he had leukemia, Warren Woodward deposited his sperm with the hope that he and his wife could use it in the future whether or not he survived.[125] Warren died in October of 1993, and in February 1995, his wife was successfully inseminated with Warren's preserved sperm.[126] Approximately two years after their father's death, Warren's wife gave birth to twin girls.[127] The Social Security Administration (SSA) rejected the mother's claims for benefits, for she had not established that the twins were her husband's "children" within the meaning of the Act and because the children could not inherit under Massachusetts intestacy law.[128] The twins' mother pursued her claim in the United States District Court for the District of Massachusetts, which certified the question to the Massachusetts Supreme Judicial Court because no Massachusetts precedent existed.[129]

In addressing the inheritance rights of posthumously conceived children, the Massachusetts Supreme Court emphasized that its role was to "balance and harmonize" the competing interests of the child, the state, and the deceased to "effect the Legislature's over-all purposes."[130] The Court noted the statutory and jurisprudential concern that all children should enjoy the same rights, regardless of the circumstances of their births.[131] The Court also identified the legislative policies favoring parental support of children, avoidance of public dependence, and support of assisted reproductive technologies.[132] Based on these legislative and jurisprudential protections of children, the court believed it would be irrational for the legislature to deny rights and protections to posthumously conceived children.[133] The court believed the decedent's interests must be protected by requiring the surviving parent to demonstrate the decedent affirmatively consented to posthumous conception and the support of any resulting child in order for the child to qualify as a legal heir of the deceased father.[134]

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124. *Id.* at 259–60.
125. *Id.* at 260.
126. *Id.*
127. *Id.*
128. *Id.* at 260–61.
129. Id. at 261.
130. *Id.* at 265.
131. *Id.* ("Repeatedly, forcefully, and unequivocally, the Legislature has expressed its will that all children be entitled to the same rights and protections of the law regardless of the accidents of their birth.").
132. *Id.*
133. *Id.* at 265–67.
134. *Id.* at 270.

Thus, as in *Kolacy*, the Massachusetts Supreme Court ignored existing paternity and inheritance law, focusing instead on reaching an equitous outcome for posthumously conceived children. However, unlike *Kolacy*, the Court also protected the interests of the decedent and permitted benefits to be given to the children only if the decedent consented to their birth.[135]

6. Gillett-Netting v. Barnhart

In *Gillett-Netting v. Barnhart*,[136] the United States District Court for the District of Arizona was called upon to determine whether posthumously conceived twins may inherit under Arizona intestacy law for purposes of qualifying for Social Security survivor benefits and whether an administrative law judge's interpretation of Arizona intestacy law violated the Equal Protection Clause of the United States Constitution.

Juliet and Piers were conceived ten months after their father's death from sperm he deposited before undergoing chemotherapy.[137] On behalf of Juliet and Piers, their mother, Rhonda, sought Social Security benefits for the children as survivors of her husband. After being denied relief by the Social Security Administration, an administrative law judge, and the Appeals Council, Rhonda sought judicial review in federal district court.[138]

The district court found that because Arizona requires an heir be in existence at the time of the decedent's death, Juliet and Piers were not "children" for purposes of the Social Security Act.[139] Although Arizona provides an exception if a child is in gestation at the time of the father's death, because Juliet and Piers were neither born nor in gestation at the time of their father's death, they could not inherit from him under Arizona intestacy law.[140]

The district court also rejected the children's equal protection claim.[141] The court believed that Juliet and Piers were not discriminated against due to the circumstances of their births, but instead based upon the timing of their births.[142] The court did not believe such discrimination involved a fundamental right or any suspect class and was therefore not subject to heightened scrutiny.[143]

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135. *Id.*
136. 231 F. Supp. 2d 961 (D. Ariz. 2002).
137. *Id.* at 963.
138. *Id.* at 964.
139. *Id.* at 966.
140. *Id.*
141. *Id.* at 970.
142. *Id.*
143. *Id.*

The court believed that the Social Security Administration acted rationally by conditioning benefits on the applicability of state intestacy laws.[144] It distinguished Supreme Court equal protection decisions involving illegitimate children on the grounds that none addressed children conceived after the death of a parent.[145]

In so holding, the district court was not influenced by the *Woodward* and *Kolacy* decisions, finding *Woodward* distinguishable and *Kolacy* unpersuasive.[146] Unlike the courts in *Woodward* and *Kolacy*, the district court interpreted Arizona intestacy law and Supreme Court precedent on equal protection literally, without reflection on equity or the law's purpose.[147]

B. Legislation

Like Louisiana, other states have enacted legislation directly addressing the issue of posthumous conception. Instead of granting posthumously conceived children greater inheritance rights, most states either expressly deny them rights, or create very narrow exceptions which will rarely apply. Others meritoriously permit a broad class of posthumously conceived children to inherit but in doing so ignore certain imperative interests.

1. The Uniform Acts

The first legislative effort in the United States to address posthumous conception was within the Uniform Status of Children of Assisted Conception Act (USCACA).[148] The USCACA favored state interests by providing that "an individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child."[149] The USCACA absolutely barred posthumously conceived children from establishing legal status. Not only did the Act ignore the best interests of the child, but it also disregarded the parent's intent and right to procreate.[150]

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144. *Id.*
145. *Id.*
146. *Id.* at 967–69.
147. *Id.*
148. Unif. Status of Children of Assisted Conception Act, 9C U.L.A. 363 (1988). The USCACA was only adopted by North Dakota and Virginia. North Dakota's version is identical to the USCACA. *See* N.D. Cent Code § 14–18–01 to 07 (1989). Virginia's legislation applies two exceptions to the USCACA. Va. Code § 20–156 to 165 (Michie 1995).
149. Unif. Status of Children of Assisted Conception Act § 4, 9C U.L.A. 371 (1988).
150. Gibbons, *supra* note 2, at 207.

In 2000, the USCACA was repealed and recodified in the Uniform Parentage Act (UPA).[151] Already, Texas and Washington have adopted the UPA and its provision relating to the legal status of posthumously conceived children.[152] The UPA provision follows the general rule of the USCACA and declares posthumously conceived children are not the children of the deceased parent. However, the UPA provides an exception where the decedent consented in a writing that any child born by assisted reproduction after his death is his child. With such written acknowledgment, the deceased parent will be recognized as the father of the posthumously conceived child, and the child will be allowed to inherit from its father.[153]

The UPA improves upon the USCACA by acknowledging parental intent and by creating circumstances in which the posthumously conceived child will be granted legal status. However, the Act is flawed in that it does not limit the time within which the child must be born in order to qualify for inheritance. By broadly granting posthumously conceived children legal status, conditioned only on the consent of the deceased parent, the UPA potentially permits the disruption of the decedent's estate many years after his death.[154]

2. Virginia

Virginia adopted a version of the USCACA with certain modifications.[155] Virginia's statute allows a posthumously conceived child to obtain legal status as the decedent's child if the "the person consents to be a parent in writing before the implantation."[156] However, there are severe restrictions upon this general provision. In order for the decedent to be a parent, the decedent must die prior to "implantation [but] before notice of the death can reasonably be

151. Uniform Parentage Act § 707, 9B U.L.A. 295, 358 (2000) ("If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.").

152. Tex. Fam. Code Ann. § 160.707 (Vernon 2002); Wash. Rev. Code Ann. § 26.26.730 (West. Supp. 2002).

153. Uniform Parentage Act §707, 9B U.L.A. 295, 358 (2000).

154. "This section is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material could lead to the deceased being determined to be a parent." *Id.* at 359 (cmt.). The UPA purportedly attempts to discourage the disruption of estates; however, by excluding a time within which the child must be born, it fails to consider an action against the estate years after its closure.

155. Va. Code Ann. § 20–156 to 165 (Michie 1995).

156. Va. Code Ann. § 20–158 (B) (Michie 1995).

communicated to the physician performing the procedure."[157] The decedent must also have expressed his consent in writing. Even if these conditions are met, unless the child is born to married parents within ten months of the parent's death, the child will not be entitled to intestate inheritance rights.[158]

Thus, although the Virginia legislature appeared to offer posthumously conceived children an opportunity to inherit, the opportunities presented are exceedingly narrow and restrictive. The first condition for legal status is achieved only if the father unexpectedly dies just as the mother is preparing to undergo or has begun artificial insemination and before the doctor performing the procedure can be notified. Such a situation is highly improbable and could only apply to an extremely narrow class of children, if any. The added requirements that the child be born within ten months of the father's death and that the parents of the child be married, mimics the traditional presumption of paternity. By reasserting the three hundred day presumption, the opportunity for a posthumously conceived child to be born within the time limitation is severely restricted. Thus, although the Virginia legislation appears to have provided posthumously conceived children with the possibility of inheriting, in reality, it is almost impossible for them to do so.

3. Florida

Florida's statute provides that "[a] child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or pre-embryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will."[159] This statute does not change the law. As discussed previously, common law states likely permit testate inheritance by posthumously conceived children through pretermission statutes. Therefore, by limiting inheritance of posthumously conceived children to merely testate inheritance, Florida has codified the status quo and effected no substantive changes in the rights of posthumously conceived children.

C. Louisiana Compared

North Dakota, Virginia, and Florida inadequately address posthumous conception and in doing so, violate the Equal Protection Clause. Although the UPA, as enacted by Texas and Washington, is

157. *Id.*
158. Va. Code Ann. §20–158 and 164 (Michie 1995).
159. Fla. Stat. Ann. § 742.17(4) (West 1997).

much more progressive as to the rights and necessary protections of the posthumously conceived child, it neglects the state's interest in the timely disposition of estates.

Louisiana Revised Statutes 9:391.1 fills the gaps left by other legislative attempts by simultaneously protecting the interests of the state, the decedent, and the child. The child is given inheritance rights, subject only to conditions necessary to protect the interests of the state and the decedent. Like the UPA, Revised Statutes 9:391.1 protects the decedent's intent by requiring written consent. Louisiana also protects the state's interests in the timely distribution of estates by requiring the child be born within three years of its father's death in order to attain legal status. Unlike Virginia and Florida, Louisiana does not unnecessarily and severely limit the posthumously conceived children that may inherit from their biological fathers. Thus, Louisiana has provided the most balanced and effective legislation on the legal status of posthumously conceived children by granting legal status to as many children as possible without harshly infringing upon the interests of the state or the decedent.

V. PROBLEMS UNADDRESSED BY 9:391.1[160]

Despite its effective and balanced protection of posthumously conceived children, Louisiana's legislation is not without flaws. There are still several concerns created by posthumous conception that have yet to be or were inadequately addressed by Louisiana's legislature.

A. Unmarried Couples

Louisiana Revised Statutes 9:391.1 applies only to married couples. The emphasis on marriage as a prerequisite to a posthumously conceived child's ability to inherit is demonstrated by the statute's requirement that the child be born to the surviving spouse and that consent by the decedent authorize the surviving

160. One problem that is beyond the scope of this comment is "sperm harvesting," which occurs when family members order sperm be extracted from a decedent's body and frozen. "Harvesting" often occurs in conjunction with an unexpected and untimely death. If the deceased's interests are to be adequately safeguarded, a high standard of evidence of the intent to reproduce after death should be required in order to prevent family members from applying their own wants or values rather than attempting to ascertain the desire of the decedent. Disregarding an individual's objections to posthumous procreation can constitute a significant harm to the interests of that deceased person and cannot be justified by reference to the procreative interests of the living. *See e.g.*, Schiff, *supra* note 52, at 945–949; Berry, *supra* note 67, at 248–250.

spouse to use his gametes.[161] However, post-mortem insemination is not prohibited to unmarried individuals. Both married and unmarried women may conceive children posthumously, but those born after the death of an unmarried parent are forbidden any right to inherit from that parent. The Task Force recommended that posthumously conceived children born to unmarried partners also receive legal status.[162] In disregarding the Task Force's suggestion, the legislature's intent may have been to discourage non-marital relations or non-marital insemination. If the Louisiana Legislature was in fact preventing inheritance by children simply because their parents were unmarried, a practice which has been condemned by the Supreme Court in regard to illegitimate children, the statute violates the Equal Protection Clause.[163] Due to equal protection concerns, the legislature should consider permitting posthumously conceived children born to unmarried couples the legal status it permits those whose parents were married or to those permitted illegitimate children born during the lives of both parents.

B. Oral and Written Consent

In order for the legal status granted by Louisiana Revised Statutes 9:391.1 to take effect, a decedent is required to have "specifically authorized in writing his surviving spouse to use his gametes." It is questionable whether this requirement is an adequate protection of the decedent's interest. A mere written authorization that a spouse may use one's gametes does not convey the donor's desire that the gametes be used after his death. If, however, the legislature believed initial consent to use the gametes sufficiently expressed a post-mortem intent to procreate, then the exclusive method of determining consent need not be written form.

The requirement of a writing fails to consider that the decision to preserve sperm may have been last-minute, prompted by a fear that medical treatment may result in sterility.[164] It also fails to consider the possibility of a statement made in confidence, such as to a doctor, or other uninterested evidence, illuminating the decedent's intent that

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161. La. R.S. 9:931.1(A) (2001).

162. Report and Recommendations of the Louisiana Task Force on Assisted Conception and Artificial Means of Reproduction at 7–8 (2001).

163. *See* Trimble v. Gordon, 430 U.S. 762, 767–71, 97 S. Ct. 1459, 1463-1467 (1977) (finding the interests of the state in promoting family and efficiency in the system were not substantially related to the statue purpose, and thus the statute violated the Equal Protection Clause of the United States Constitution).

164. *See* Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961, 963 (D. Ariz. 2002) (Despite the doctor's recommendation of immediate cancer treatment, plaintiff's husband delayed treatments in order to deposit and preserve his sperm).

his spouse use his gametes, perhaps even after death. Consent demonstrated by clear and convincing evidence would better protect the decedent's interests.

CONCLUSION

Advances in technology have produced gaps in the law and now force legislators to confront difficult ethical and legal issues. Whether children conceived posthumously by artificial insemination may inherit from their biological fathers is a problem few legislatures have been willing to address. Most of those that addressed posthumous conception failed to protect the children, instead creating barriers against their inheritance. Although cases resolve the issues created by posthumous conception, their results vary and are limited only to the rights of the specific parties involved. In order for the inheritance rights of posthumously conceived children to be adequately addressed, there must be specific legislation that addresses not only the litigants' rights, but also the rights of all posthumously conceived children.

By successfully balancing the legal interests of the state, the decedent, and the posthumously conceived child, Louisiana's legislation serves as a model for those states contemplating legislation on the matter. However, other states should consider the flaws of Louisiana's legislation, particularly those concerning the posthumously conceived children of unmarried parents. Nonetheless, the flaws in Louisiana's legislation are curable and the state's legislation is a tremendous step forward for children and medical science.

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